UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 28

RENAISSANCE HOTEL OPERATING COMPANY d/b/a RENAISSANCE PHOENIX DOWNTOWN HOTEL

And **Case 28-CA-181477**

UNITE HERE, LOCAL 631

and

ERUBEY QUINTERO, an Individual

Party in Interest

MARRIOTT INTERNATIONAL, INC.

And **Case 28-CA-187281**

UNITE HERE, LOCAL 631

ANSWERING BRIEF OF RESPONDENTS RENAISSANCE HOTEL OPERATING COMPANY AND MARRIOTT INTERNATIONAL, INC. TO THE NATIONAL LABOR RELATIONS BOARD

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INTRODUCTION

The CGC's Initial Brief establishes two things: (1) just how unworkable the *Lutheran Heritage* "reasonably construe" standard has become – especially when the CGC scrutinizes every word, phrase, or portion of an employee handbook in isolation and takes lawful provisions out of context; and (2) why the "reasonably construe" standard should be replaced with the "balancing test" proposed by Chairman Miscimarra in his dissents in *William Beaumont Hospital* and *Verizon Wireless*. Utterly absent from the CGC's analysis is any acknowledgement of the Hotel's legitimate business justifications for the challenged policies. The CGC's Initial Brief instead reveals a perspective, unfounded in the Act, that the most remote potential impact on Section 7 rights precludes policies that protect substantial employer interests, including the compelling privacy rights of Hotel guests. Although the CGC ignores them in its brief, those rights and legitimate interests justify the challenged policies when appropriately balanced.

Even under an impartial application of the "reasonably construe" standard, the CGC's strained and nonsensical interpretations make clear that only a Regional Director in an NLRB office building, not a reasonable employee working at the Hotel, would subjectively read the challenged policies as somehow limiting protected concerted activity. Consequently, requiring employees to acknowledge and agree to abide by such lawful policies does not violate the Act. Moreover, the CGC fails to provide any basis to excuse the Union's waiver of its rights, and those of the employees it represents, to challenge the handbook provisions and acknowledgment. The CGC simply cannot meet its burden "with a fair preponderance of the reliable, probative, and substantial evidence." *Delta Finishing Co.*, 111 NLRB 659, 684 (1955). However, if the Board were to find that one of the challenged provisions somehow violates the Act, a nationwide posting is inappropriate because the handbook at issue applies only at the Renaissance Phoenix Downtown Hotel and Respondents' other union-represented properties.

ARGUMENT

I. THE CGC'S INITIAL BRIEF FAILS TO DEMONSTRATE THAT THE HOTEL'S HANDBOOK INTERFERES WITH SECTION 7 RIGHTS.

When determining whether employees would reasonably construe neutral workplace policies as restricting Section 7 activity, the Board must consider the context in which the policy is found and "refrain from reading particular phrases in isolation." *Lutheran Heritage*, 343 NLRB at 646. In context, the handbook's definition of "Confidential Information" is limited to preserving the confidentiality of sensitive guest information and proprietary business information of the Hotel. The definition applies to information "that derives independent value from not being generally known to the public" (including, for example, "pricing strategies" and "trade secrets"). [Jt. Ex. 7, at 14.] The Board upheld a similar confidentiality policy in *Lafayette Park Hotel*, recognizing that hotels "clearly" have a legitimate interest in maintaining the confidentiality of private guest information "and a range of other proprietary information." 326 NLRB 824, 826 (1998). To dispel any potential for confusion, the last sentence of the definition expressly states "*[t]his policy does not prohibit associates from discussing wages, hours, or other terms and conditions of employment*." [Jt. Ex. 7, at 14-15 (emphasis added).]

Flex Frac Logistics, LLC, and the other cases cited in the CGC's Initial Brief, do not support the CGC's argument. The policy in *Flex Frac*, for example, was found unlawful because it "[did] nothing to remove employees' reasonable impression that they would face termination if they were to discuss their wages with anyone outside the company." *Flex Frac Logistics, LLC*, 358 NLRB 1131, 1132 (2012). Here, employees would not reasonably construe the terms "personnel matters" and "finances" to encompass their hours, wages, or employee contact information when the *very same paragraph* expressly states that it does not "prohibit associates from discussing [their] wages, hours, or other terms and conditions of employment." [Jt. Ex. 7, at

14-15.] Indeed, the CGC acknowledges that a disclaimer is *most effective* when it is "prominent or proximate to the rule it references," which is the case with the Hotel's handbook. [CGC Initial Brief, at 9.] Because the "Confidential Information" policy is lawful, the Hotel may lawfully discipline employees who violate that policy. *See, e.g.*, *Beckley Appalachian Reg'l Hosp.*, 318 NLRB 907, 908-09 (1995) (affirming employee's dismissal for disclosing confidential records).

The CGC also erroneously insists that *Quicken Loans, Inc.*, 359 NLRB 1201 (2013) supports its argument that the Hotel's "Confidential and Proprietary Information" designation is unlawful. To the contrary, the policy in *Quicken Loans* prohibited disclosure of employee "home phone numbers, cell phone numbers, addresses, and email addresses" – not the handbook itself. *Id.* at 1201 n.3. Had the Board in *Quicken Loans* decided the issue the CGC claims, then the General Counsel surely would not have found that employers could legally adopt work rules providing that "no part of [the] handbook may be reproduced or transmitted" and "disclosure of [the] handbook to competitors is prohibited." G.C. Memo, at 26. The Hotel's "Confidential and Proprietary" designation is simply an abbreviated version of that language. Moreover, it is illogical for the CGC to argue that employees would reasonably construe the designation as prohibiting disclosure of the handbook "to labor organizations, government agencies, judicial forums, or others in furtherance of Section 7 activities" when the Hotel provided a copy of the handbook to the Union prior to its implementation and voluntarily provided a copy of the handbook to Region 28 for purposes of this proceeding. [Jt. Ex. 8.]

Further, the Hotel (like all innkeepers) has no greater or more compelling business interest than ensuring the privacy of its guests, who understandably expect that they will be able to enjoy the Hotel's amenities without having their privacy compromised by Hotel employees. Likewise, an employee who reads the Hotel's "Personal & Social Relationships In The

Workplace" policy would reasonably interpret it as a lawful directive focused on ensuring an overall positive guest experience. *See Lafayette Park Hotel*, 326 NLRB at 827-28 (finding lawful a rule prohibiting employees from fraternizing with hotel guests on hotel property); *see also Restaurant Horikawa*, 260 NLRB 197, 198 (1982). The requirement that employees "maintain[] professional and businesslike relations with [guests]" specifically tracks language identified as lawful by the General Counsel. *See* G.C. Memo, at 7 (approving rules "that require[] employees to be respectful and professional to . . . clients."). Hotel employees would not reasonably read restrictions on "social or personal activities with guests on Company premises" including, for example, "intimate" relationships or requests for "autographs" or "discounts," as limiting their ability to engage in Section 7 activities. [Jt. Ex. 7, at 18.] This is especially true when viewed in context with instructive language in the handbook. This policy is found in the handbook's "General Rules & Guidelines," which expressly states the rules "should not be interpreted as prohibiting you *from discussing the terms and conditions of your employment in accordance with . . . the National Labor Relations Act*." [Jt. Ex. 7, at 20-21 (emphasis added).] Nor would employees reasonably construe the policy as limiting their conduct "outside the workplace" when it expressly states that it does not "interfere with . . . off-duty conduct." [Jt. Ex. 7, at 18.]

Similarly, Hotel employees would not reasonably construe the Hotel's "Personal Mobile Devices" policy as chilling Section 7 activity. Hotel employees are expected to and routinely provide assistance to guests in various areas of the Hotel (including the lobby, conference center, pool area, food and beverage outlets, and guest rooms). Based on the realities of their job, they would reasonably understand the policy's stated purpose – "maximiz[ing] the level of personal attention you provide to each guest you encounter" – as requiring them to eliminate distractions so they can be attentive to guest needs during working time. [Jt. Ex. 7, at 17.] The decisions

cited by the CGC are inapposite as each of the challenged policies in those cases "unqualifiedly prohibit[ed] all workplace recording" and failed to "differentiate between working and non-working time." *Whole Foods Market Grp., Inc.*, 363 NLRB No. 87, slip op. at 4 & n.10 (2015); *see also T-Mobile USA, Inc.*, 363 NLRB No. 171, slip op. at 4-5 (2016). Unlike the policies in those decisions, the Hotel's policy limits the use of mobile devices only during working time. *See Flagstaff Med. Ctr., Inc.*, 357 NLRB 659, 662-63 (2011) (cell phone ban during working time was lawful). The CGC has not cited to, and cannot cite to, any Board decision finding a policy like the Hotel's "Personal Mobile Devices" policy to violate the Act.

Next, nothing in the Hotel's "Social Media Rules of Conduct & Guidelines" can reasonably be read to interfere with employee Section 7 rights. The portion of the policy addressing "unsubstantiated claims" applies to discussions regarding "the Company's products and services." [Jt. Ex. 7, at 19.]; *see NLRB v. Local Union No. 1229, Int'l Bhd. of. Elec. Workers*, 346 U.S. 464, 475-76 (1953) (disparaging remarks about the employer's products – not wages, hours, or working conditions – are not protected by the Act). The challenged language is narrowly tailored to ensure compliance with applicable SEC regulations, as evidenced by the policy's reference to "investor" information and information "considered important in a decision *to buy, hold or sell Marriott securities*." [Jt. Ex. 7, at 19 (emphasis added).] When viewed in context (not in isolation), that language does not prohibit employees from communicating with third parties about their working conditions. The CGC's citation to the Merriam-Webster dictionary does not change that result. Indeed, under the "reasonably construe" standard, it is not the definition of a word in isolation, but how it is used in context that colors a reasonable employee's interpretation of the language. Employees use common sense, real-world experience and knowledge of their work environment to "reasonably construe" employer policies – not

hypothetical and strained academic exercises to uncover speculative possibilities. No reasonable Hotel employee would read the language to "be accurate" as chilling Section 7 activity.

In that vein, the CGC's interpretation of the Hotel's policy on posting photographs and video improperly assumes employees would construe the words "photographs" and "video" to first and foremost refer to taking photos and video of protected activity. *See Lutheran Heritage*, 343 NLRB at 646 (the Board "must not presume improper interference with employee rights"). Instead, Hotel employees would reasonably construe the policy as requiring them to respect guest privacy and comply with applicable intellectual property laws. A hotel room is an extension of a guest's residence, so much so that the Supreme Court has held that "a guest in a hotel room is entitled to constitutional protection against unreasonable searches and seizures . . . no less than a tenant of a house, or the occupant of a room in a boarding house." *Stoner v. State of Cal.*, 376 U.S. 483, 490 (1964). Guests, especially celebrities and children, are particularly vulnerable during stays at a hotel, whether it be while sleeping, showering, relaxing at the pool, visiting the spa or fitness center, or enjoying the food and beverage outlets. Guests should be able to reasonably rely on the Hotel to maintain policies and procedures to protect them from employees taking unauthorized photos or video. Moreover, the policy at issue is narrowly tailored to the Hotel's legitimate business interests as it only prohibits the posting of pictures and video of guests, customers, and other third parties *without their written consent*. [Jt. Ex. 7, at 19.] It is unreasonable for the CGC to assume employees would construe such a rule as chilling Section 7 activity. Indeed, the Hotel dispelled any chance of an employee confusing the policy's intent by modifying its "Rules of Conduct and Guidelines" (where the challenged language resides in the handbook) with a clear and unmistakable savings clause that expressly protects Section 7 activity under the Act. [Jt. Ex. 7, at 20-21.]

The CGC's insistence that the Hotel's "Social Media Rules of Conduct & Guidelines" interfere with Section 7 activity is contrary to the rule's express language and remarkably insensitive to the realities of today's workplace. Employees in the hospitality industry are keenly aware of the job requirement to provide high-quality, professional service to guests and patrons. With the advent of social media, an employee's regrettable indiscretions with a Hotel guest or coworker could go viral within minutes. To mitigate that possibility, the Hotel promulgated suggestions for employees to "keep [their] cool" and "present [their] views in a clear manner" without "slurs" or "personal insults." [Jt. Ex. 7, at 20.] Contrary to the CGC's assertion, nothing in the policy prevents employees from criticizing management or discussing the terms and conditions of their employment in a zealous manner. Although the CGC disingenuously argues the policy "fails to define the area of permissible conduct," the stated language of the policy makes clear it is directed at "know[ingly] false statements" and conduct that is "malicious, threatening, or obscene" – all things the Board has held employers may lawfully prohibit. *See, e.g.*, *Palms Hotel & Casino*, 344 NLRB 1363, 1368 (2005) (finding lawful a rule prohibiting "injurious, offensive, [and] threatening" conduct); *Lutheran Heritage*, 343 NLRB at 647 (employer could lawfully prohibit "abusive or profane language"); G.C. Memo, at 7 (noting that rules prohibiting "harassment," "inappropriate gestures," "threatening, intimidating, coercing" conduct, and "violent, discriminatory, abusive, offensive, demeaning, or otherwise unprofessional message[s]" were lawful). Unlike the decisions cited by the CGC in its Initial Brief, the Hotel's policy does not prohibit "offensive" or "insulting" language in a vacuum. Instead, the Hotel's handbook has no fewer than three disclaimers reminding employees that none of its rules or policies should be construed as interfering with their rights to discuss their wages, benefits, and other terms and conditions of employment. [Jt. Ex. 7, at 5, 14, and 20.]

As with the other challenged policies, employees would reasonably construe the Hotel's harassment policy as prohibiting what its plain text provides – unlawful harassment, discrimination, and retaliation – not Section 7 activity. *See Lutheran Heritage*, 343 NLRB at 647 (rule prohibiting "harassment" was lawful). The CGC's analysis to the contrary conveniently omits a critical component of the policy, which must be viewed in context. As that critical component demonstrates, the policy prohibits harassment, discrimination and retaliation based on an individual's "*race, color, religion, sex (including pregnancy), sexual orientation, gender identity or expression, national origin, age, disability, genetic information, military status, or other basis* . . . prohibited by state and federal laws." [Jt. Ex. 7, at 11-12 (emphasis added).] In light of that context, no reasonable employee would construe the rule as limiting or punishing protected concerted arguments or criticisms. *See Adtranz ABB Diamler-Benz Transp., N.A., Inc.*, 253 F.3d 19, 28 (D.C. Cir. 2001) (finding "simply preposterous" any argument that the employer's policy prohibiting "harassment" was unlawful under the Act). The CGC offers no explanation for its conclusion that Hotel employees would believe the rule limits their interactions with supervisors when the rule only addresses "harassment *of any associate* by any other associate, manager" or other third party. [Jt. Ex. 7, at 11 (emphasis added).] Given the policy's narrow focus on harassment and the specific delineation of legally-protected classifications, a reasonable employee would construe it only as prohibiting unlawful harassment, discrimination, and retaliation – not interfering with Section 7 rights.

Finally, the CGC's attack on the Hotel's distribution policy is unfounded. The CGC admits that rules prohibiting distribution of literature in work areas and during working time – like the Hotel's – are presumptively valid. [CGC Initial Brief, at 20.]; *Beverly Enterprises-Hawaii, Inc.*, 326 NLRB 335, 335-36 (1998). Under no circumstances would Hotel employees

reasonably construe the term "work area" as encompassing exterior areas such as parking lots or gates. *See Beverly Enterprises-Hawaii, Inc.*, 326 NLRB at 335-36 (a rule that prohibits distribution in "any working area of the facility" does not include non-work areas). While the CGC attempts to invalidate the Hotel's lawful distribution policy by arguing that employees would reasonably construe a ban on distributing "literature" to infringe on their right to use the Hotel's email system during non-working time, the Board rejected this same argument six months ago. *See Essendant Co.*, 365 NLRB No. 46, slip op. at 1-2 (2017) (affirming ALJ's determination that the employer's policy prohibiting distribution in any work area could not reasonably be read as violating *Purple Communications*). Accordingly, the Hotel's distribution policy is lawful and the Board should reject the CGC's attempt to argue otherwise.

II. THE HANDBOOK'S ACKNOWLEDGEMENT FORM SIMPLY REQUIRES EMPLOYEES TO ACKNOWLEDGE AND ABIDE BY LAWFUL POLICIES.

The last page of the Hotel's handbook is an acknowledgement form that employees are expected to execute to confirm that they have read and understand the handbook, and agree to comply with the Hotel's policies and work rules. The CGC has not argued, and cannot argue, that the language in the acknowledgement form is unlawful separate and apart from the challenged policies. Accordingly, because the policies addressed above do not violate the Act, the form itself cannot violate the Act. *See, e.g.*, *Arlington Hotel Co., Inc.*, 278 NLRB 26, 28 (1986) (employees may be required to sign a form acknowledging receipt of lawful policies).

III. THE CGC FAILS TO REFUTE THE UNION'S WAIVER.

The CGC does not offer any explanation for the Union's failure to timely assert the Section 7 rights of the employees it represents. The CGC does not dispute that the Union failed to respond to the Hotel's invitation to bargain over the proposed handbook, and only challenged the language at issue after Hotel employees sought to decertify the Union. *See Associated Milk*

Producers, 300 NLRB 561 (1990) (union waived employee rights to pension contributions by failing to respond to the company's invitation to bargain and, instead, filing an unfair labor practice charge). Rather, the CGC disingenuously argues that there was no waiver because the Union does not represent employees at all of the facilities where the handbook is in effect. The CGC fails to note that the same labor organization – UNITE HERE – represents employees at Respondent's other unionized properties – not just at the Renaissance Phoenix Downtown Hotel. Moreover, the Union's General Counsel, who has appeared on behalf of the Union in this matter, is based out of UNITE HERE Local 11 in Los Angeles – not UNITE HERE Local 631 in Phoenix. The Union is a sophisticated labor organization with nationwide operations. There is no reason to limit the Union's waiver to the Renaissance Phoenix Downtown Hotel.

IV. A NATIONWIDE POSTING WOULD BE INAPPROPRIATE IN THIS CASE.

Even if the Board determines that a challenged provision in the Hotel's handbook violates the Act, the CGC's request for a nationwide posting would be an unnecessary and disproportionate remedy. Any remedial posting should be limited to the Renaissance Phoenix Downtown Hotel because that is where the underlying events occurred and where the individual party in interest (Erubey Quintero) was employed. If the Board believes a broader posting is appropriate, at most, any posting should be limited to Respondents' union-represented properties, as the handbook explicitly states that it applies only to "non-management *represented* associates of managed hotels in the United States[.]" [Jt. Ex. 7, at 5 (emphasis added).]

CONCLUSION

For all of the above reasons and those contained in the Hotel's Initial Brief, the Hotel respectfully requests that the Board find the challenged handbook provisions do not violate the Act and dismiss the Complaint in its entirety.

Dated this 10th day of October 2017.

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